Filed 8/12/02

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARCOS CHAVEZ et al., Defendants and Appellants.	F034110 (Super. Ct. No. 98-41328) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant Marcos Chavez.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Guzman.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Prado.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Patrick J. Whalen, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2 through 10.

PROCEDURAL HISTORY

An information was filed October 15, 1998, charging Marcos Chavez (Chavez), Jaime Guzman (Guzman) and Alejandro Prado (Prado) (collectively appellants) with multiple felonies. In count 1, appellants were charged with the murder of Marlene Romero (Romero), in violation of Penal Code section 187.[1] It was specially alleged that the murder was intentional and was perpetrated by discharging a firearm from a motor vehicle with the intent to inflict death within the meaning of section 190.2, subdivision (a)(21). Counts 2, 3, 4 and 5 charged appellants with the attempted premeditated and deliberate murders of Ray P., Shalisa H., Celeste M. and Joseph A. in violation of sections 664 and 187. Appellants were charged in count 6 with discharging a firearm from a motor vehicle in violation of section 246. In count 7, Chavez was charged with permitting the discharge of a firearm from his vehicle in violation of section 12034, subdivision (b). As to counts 1 through 5, it was specially alleged that Prado and Guzman personally used a firearm within the meaning of section 12022.5, subdivision (a)(1), and they discharged a firearm from a motor vehicle causing great bodily injury within the meaning of section 12022.5, subdivision (b)(1). As to counts 1 through 5 it was alleged Chavez was armed with a firearm within the meaning of section 12022, subdivision (a)(1). As to count 2, it was specially alleged Guzman personally inflicted great bodily injury within the meaning of section 12022.7. As to count 3, it was specially alleged Prado personally inflicted great bodily injury within the meaning of section 12022.7.

Jury trial began on June 28, 1999. On July 23, 1999, the jury returned guilty verdicts on all counts and found all special allegations to be true. Following the reading of the verdict, Guzman requested a declaration from the foreperson as to the theory agreed upon by the jury with respect to intent, but the court refused the request.

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[1] All further statutory references will be to the Penal Code unless otherwise stated.

Chavez was sentenced to four consecutive terms of life with the possibility of parole on counts 2, 3, 4 and 5. Count 2 was enhanced by one year for the arming enhancement, while counts 3, 4 and 5 were each enhanced by four months for the arming enhancement. Chavez was sentenced to seven years on count 6, but the term was stayed pursuant to section 654. He was sentenced to eight months on count 7, to run consecutive to count 5. On count 1, Chavez was sentenced to life without possibility of parole, plus four months for the arming enhancement, to run consecutive to count 7.

Prado was sentenced to four consecutive terms of life with the possibility of parole on counts 2, 3, 4 and 5. Each count was enhanced by 10 years pursuant to section 12022.5, subdivision (b)(1). Count 3 was further enhanced by an additional three years pursuant to section 12022.7. On count 6, Prado was sentenced to two years, but the term was stayed pursuant to section 654. On count 1, Prado was sentenced to life without the possibility of parole, plus 10 years pursuant to section 12022.5, subdivision (b)(1), to run consecutive to count 5.

Guzman was sentenced to four consecutive terms of life with the possibility of parole on counts 2, 3, 4 and 5. Each count was enhanced by 10 years under section 12022.5, subdivision (b)(1), and count 2 was enhanced by an additional three years under section 12022.7. Guzman was sentenced to three years on count 6, but the term was stayed pursuant to section 654. On count 1, Guzman was sentenced to life without the possibility of parole, plus 10 years pursuant to section 12022.5, subdivision (b)(1), to be served consecutive to count 5.

Chavez, Guzman and Prado all filed timely notices of appeal.

FACTS

On November 22, 1997, at 8:45 p.m., Police Officer Christopher Bowersox was dispatched to North Second Street to investigate a report of shots fired in the area. When he arrived at the scene, Officer Bowersox was directed by several people to a residence on North Third Street. Officer Bowersox spoke with Prado, who lived at that location. In the backyard of the residence, Officer Bowersox found an expended shell casing on

the ground near the garage. The casing was a .38-caliber, and was "extremely shiny" and very fresh as it had no dirt, moisture, or weathering of any kind on it. Officer Bowersox searched the house and found no weapons. One bedroom was locked and could not be searched.

Prado could not explain the casing in the backyard. He said he had heard shots while he was on the telephone. Neither Chavez nor Guzman were present at Prado's home at that time.

Earlier that same evening, at approximately 8:00 p.m., Joseph A., a high school student, was driving his father's brand new black, four-door 1997 Dodge Neon. Celeste M., Ray P. and Shalisa H. were also in the car. Celeste was in the front passenger seat. Ray was behind Celeste, and Shalisa was behind Joseph. They went to Taco Bell and Jack in the Box to get something to eat.

As they were driving on Olive Street, a metallic beige, four-door Honda Civic pulled up on the driver's side. There were five people in the Honda Civic, two in the front and three in back. Shalisa started talking to Alejandro "Big Alex" Prado (Big Alex), who was in the rear right seat.[2] Chavez was also in the Honda Civic, either driving or sitting in the front passenger seat. At this time, Prado was not in the car.

Big Alex began arguing with Shalisa about her dating activities. Foul language was used. Big Alex had dated Shalisa. He gave her a dirty look and said something like, "Fuck you bitches" or "Bitches, you ain't nothing but ho's. You're with pussy ass guys." Big Alex and Chavez appeared angry because Shalisa was in a car with other males. Shalisa asked Joseph to pull over at the car wash so she could talk to Big Alex. The people in the Honda Civic were using hand signals to tell Joseph to pull over. They were giving the occupants of the Dodge Neon "mean" looks and cussing at Joseph. Joseph was not talking to the occupants of the Honda Civic or giving them dirty looks.

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[2] "Big Alex" Prado is a cousin to appellant Prado.

Shalisa got upset and "flipped off" Big Alex. The Honda Civic pulled into the car wash. Joseph pulled over at the car wash, and Shalisa got out to talk to Big Alex. However, the Honda Civic pulled away quickly and drove out of the parking lot. No words were exchanged.

Joseph then saw his friend Marlene Romero, who said she needed to go to the bathroom. Joseph offered to drive her to Jack in the Box. Romero sat in the back seat between Shalisa and Ray. After going to Jack in the Box, Joseph drove back to the car wash. Joseph, Celeste, Ray, Shalisa and Romero spent some time at the car wash as well as cruising up and down Olive Street. After "hanging out" for a while, Romero asked to use the restroom again, so Joseph drove her to the mini-mart on West Olive.

Upon returning to the car wash, Joseph and the others looked for Romero's brother so Romero could go home with him, but they could not find him. Joseph offered to give Romero a ride to the Strathmore area. On the way, they stopped at a donut shop at 12:25 a.m. so Celeste could use a pay phone. Joseph noticed the beige Honda Civic with three people in it pass by. Joseph drove down Olive Street once more looking for Romero's brother, and then drove toward Highway 65.

As they pulled out of the driveway at the donut shop, Celeste noticed two cars behind them. One was the Honda Civic she had seen earlier; the other was a dark gray or black car. Big Alex was driving the darker car. As Joseph got on the highway, the darker car made a U-turn and did not get on the onramp. As Joseph was driving north on Highway 65, both the darker car and the beige Honda Civic pulled up behind Joseph. Joseph was travelling in the right-hand lane at 55 to 60 miles per hour.

The Honda Civic then pulled up beside Joseph in the left lane. Joseph saw three people in the Honda Civic. The dark car pulled up directly behind Joseph. Celeste could not see who was driving the Honda Civic, but saw Prado in the front seat and Guzman behind Prado. Shalisa also saw Prado was in the front passenger seat. There was no conversation between the vehicles.

The Honda Civic pulled right alongside Joseph's car, bumper to bumper. No one in either car was flashing any signs or talking to anyone in another car and no one displayed any weapons. Big Alex was driving the darker car behind Joseph.

Seconds after the cars pulled up close to his car, Joseph heard shots being fired. Joseph looked back and saw that the shots were coming from the Honda Civic. Joseph saw flashes from guns from two separate places in the Honda Civic, the front passenger area and the rear right passenger area. Ray also saw flashes coming from the front and rear passenger section of the darker car. He saw a gun coming out of the front passenger window, and a flash from the gun.

Ray ducked and heard something ripping through the metal of the car. Celeste saw sparks coming out of the beige car and put her head down toward the corner of the door. She heard popping sounds. Joseph heard more than 10 shots. Shalisa ducked but was shot in the shoulder. Her head was between her knees, and she felt a hot, stinging pain in her back. It was later learned that the bullet entered her back, chipped a bone, hit her lungs, and then exited through her right armpit. The gunshots affected her hearing so that she could only hear a buzzing sound.

Joseph sped up. Shalisa complained that her arm was hurting. When the noise stopped, everyone sat up and began asking the others if they were okay. Romero did not sit up and did not answer. She was bleeding heavily. Ray felt a stinging pain in his back. He later learned a bullet had entered his torso, hit a rib, and exited.

Celeste looked back and saw the Honda Civic turn left off the highway just prior to the canal. Joseph started to drive faster. He heard screaming inside his car. Joseph could no longer see the darker car. Joseph turned on the light in the car and saw Romero and Ray had been shot. He drove to the hospital.

On the way to the hospital, Ray tried to hold Romero upright. Celeste kept talking to Shalisa because she kept passing out. Romero was breathing heavily, but then stopped breathing.

At the hospital, Dr. T. Scott Smith, the emergency room doctor on duty, found Romero still had a pulse and was still breathing. However, despite emergency treatment, she died shortly after arrival. Dr. Smith examined the bullet wound in Shalisa's back. It was a "through and through" wound which missed several major blood vessels and bony structures and damaged mostly soft tissue. Ray had a bullet wound in which the bullet struck a rib but did not damage the lung. Dr. Smith did not observe any signs of alcohol use on any of the victims.

Joseph was taken to another hospital, where his blood was drawn. The shooting occurred around 12:45 a.m., and the blood draw took place five and one-half hours later. Joseph was taking prescription cough medicine and pills to combat an infection. Joseph denied drinking any alcohol that night.

Ray had blood drawn at a hospital later that night. Ray stated he had had a "drink of a friend's beer," but testified Joseph was not drinking that night. Celeste also had blood drawn at a hospital. She had had a beer earlier in the evening, before she went out, but at the time of the shooting, the beer no longer affected her. Shalisa had also been drinking that night.

Sheriff's Detective James Hilger interviewed the four victims at the hospital. None appeared to be under the influence of alcohol.

Ray did not see any weapons in Joseph's car that night, although there was a baseball bat in the trunk. No one displayed the bat as a weapon that night.

A pathologist conducted an autopsy on Romero. She had two gunshot wounds to her head. There was an entrance wound on the left side of her head near her left eyebrow, and an exit wound in the right neck area. Romero bled to death from the gunshot wound.

Ray looked at a photographic lineup, but could not identify anyone. Shalisa identified Prado as the passenger in the car from which the shots were fired. Some time after the shooting, Celeste identified Prado and Guzman from photographic lineups.

Celeste identified Guzman as sitting in the right rear seat. Neither Joseph nor Ray were able to identify anyone.

Police Officer Richard Wilkinson examined the black Dodge Neon at the hospital. He found bullet holes in the rear of the vehicle, around the trunk and the door. He also found a bullet in the crease of the back seat. Later he found another bullet on the ground where the car had been parked.

Sergeant Frank Bardone of the Tulare County Sheriff's Office was dispatched to the location of the shooting on Highway 65 at 1:13 a.m. on November 23, 1997. He closed off the highway to preserve the evidence. In the area, Sergeant Bardone found several shell casings and a lead core from a bullet. Sergeant Bardone testified the position of the shell casings led him to believe there were several shots fired from one location on the highway, a slight pause, and then another series of shots further down the highway.

Sergeant Bardone observed Joseph, Ray, Shalisa and Celeste at the hospital and none of them appeared to be under the influence of alcohol. After speaking to the victims at the hospital, he obtained the name of Prado as a suspect. He also received a description of the suspects' car as being a beige or tan Honda Civic. Sergeant Bardone examined the Dodge Neon and saw it had bullet holes, two in the trunk, one in the left rear wheel well and one in the quarter panel. The car had a flat tire and contained a large amount of blood.

Big Alex testified that his mother owned a two-door black Honda Accord in 1997, which he drove on occasion. On the night of the shooting, Big Alex went to Prado's house for a party. Prado and Guzman were present. When he discovered there was no beer in the house, he went to a store in Plainview. On the way there, Big Alex, who was accompanied by Guzman, picked up Chavez. They returned to Prado's house with beer. When they arrived at Prado's, they saw police cars, so they drove around the block until the police left. Prado did not give Big Alex a straight answer as to why the police had

been at the house. At some point, Big Alex became aware that someone had been shooting a gun in Prado's backyard.

Big Alex and Chavez, along with two others, left the house to go cruising on Olive. At some point, a car with girls in the back pulled beside them and Big Alex tried to pick up one of the girls. The male driver of the car got upset. One of the girls in the car was Shalisa, whom Big Alex knew and had "gotten together" with. Big Alex saw someone's hand go up, but he was not sure if it was a gang sign. Chavez and Joseph exchanged words, but Big Alex could not recall what was said. However, Chavez was not happy. The driver of the other car invited them to follow them to the car wash so Big Alex and Shalisa could talk. There was too much of a crowd at the car wash, so Big Alex did not get out of the car and just left. Big Alex did not think Shalisa had flipped him off. Big Alex and the others in the car returned to Prado's house.

After being at Prado's for awhile, Big Alex left in his car with one other person and returned to Olive to look for girls. Big Alex saw Joseph's car again that night, but he did not "mad dog" anyone in the car. Big Alex also saw Chavez driving later that night. On the morning following the incident, Big Alex told the police Guzman and Prado were in Chavez's car with Chavez. At trial Big Alex testified he saw Chavez driving, but did not see who else was in the car. Big Alex saw Chavez's car side-by-side with Joseph's car on Olive getting on the onramp. Chavez directed Big Alex to follow them on to Highway 65, so Big Alex had to turn around to do so. Big Alex saw two cars side-by-side in the distance on the highway. He then saw Chavez's car speed off in another direction, while Joseph's car began to veer off the road as if it were crashing. Big Alex saw some flashes coming from Chavez's car, but he did not see any guns.

Big Alex followed Joseph's car for awhile, intending to help them if they crashed. Joseph's car ran a red light. Big Alex returned to Prado's house. When he arrived, Chavez's car was already parked there. Chavez was very scared, but Prado was acting normally. Guzman was relaxing on the couch. Big Alex asked what had happened, and

they told him they had shot into the air. At some point, Chavez moved his car from the curb to the driveway behind the gate.

The police arrived at Prado's house an hour later. Big Alex, Prado, Guzman and Chavez were all arrested. Big Alex never saw any guns that night, and did not hide any guns used in the shooting.

Sheriff's Detective Thomas Ludwig went to Prado's house at 2:23 a.m. that morning. There was a black, two-door Honda Accord in the driveway. Detective Ludwig determined, via radio, that the vehicle belonged to Alejandro Prado (Big Alex) and Suzie Prado in Strathmore. There was a silver, four-door Honda Civic behind a chain link fence. The hood of the car was covered with a blanket. The hoods of both vehicles were warm. Big Alex, Guzman, Prado and Chavez were separated and transported to the sheriff's station.

Sheriff's Detective Allen Galloway searched the Honda Civic. He found a spent nine-millimeter shell casing in the car. He ordered residue testing on the right front passenger door.

The residences of Guzman, Chavez and Big Alex were searched. No weapons were found, but live ammunition and 12 spent .38-caliber shell casings were found at Big Alex's residence. Later, a nine-millimeter handgun was seized from Big Alex's residence.

Sheriff's Sergeant Brian Johnson testified that Detective Jim Schwabenland[3] examined the black Dodge Neon and recovered bullets and an aluminum bat from the trunk. A gunshot residue test was performed on the Honda Civic on November 23, 1997, and sent to Los Angeles for testing. Further testing was done on the car a few days later. Gunshot residue tests were performed on each appellant in the early morning hours of November 23, 1997. The kits were also sent to Los Angeles for testing.

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[3]Detective Schwabenland died prior to trial.

The gunshot residue kits were examined by Steven Dowell, a criminalist in Los Angeles. Prado was found to have gunshot residue on his hands. This would indicate Prado either fired a gun, handled a gun recently fired, or came in contact with someone who fired a gun. No residue was found on either Chavez or Guzman. Gunshot residue was found on the inside right portion of the Honda Civic, but not on the right front exterior. Residue was also found on the right rear exterior, but not on the interior.

Detective Schwabenland lifted latent fingerprints from the Honda Civic, the Honda Accord and from Prado, Guzman and Chavez. Detective Ed Christopherson found Prado's prints matched a print found on the outside surface of the right rear door of the Honda Civic, near the door handle. None of the other prints matched.

Sheriff's Detective Jake Huerta took a statement from Guzman at 4:20 a.m. on November 23, 1997. Guzman waived his *Miranda*[4] rights and corroborated Big Alex's version of events up to the point where Big Alex left to go cruising on Olive. Guzman claimed he stayed at Prado's house until the police arrested him. He denied any knowledge of a gun or the shooting.

Detective Huerta spoke to Chavez at 6:11 a.m. on November 23, 1997. Chavez waived his *Miranda* rights and claimed he was at Prado's house for most of the evening until the police arrived. He denied going out cruising in any car that night.

Detective Hilger interviewed Prado. The interview with Prado took place at 12:13 p.m. on November 23, 1997, at a police station and was tape recorded. Prado waived his *Miranda* rights.

Prado told Detective Hilger he was home all night until he was arrested. He claimed his sister Elvelia could verify his alibi, and he gave Detective Hilger her phone number. He named others who could verify his alibi, but he was unable to provide any contact information for them. Detective Hilger gave Prado his card and asked him to have his alibi witnesses contact him, but they never did.

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[4]*Miranda v. Arizona* (1966) 384 U.S. 436.

Mindy Sciutto worked at a restaurant with Prado's sister Elvelia.[5] Elvelia told Sciutto she went to her brother's house after the police had searched it on November 29, 1997, and found a gun in her parents' sock drawer. A bullet had been shot out of the gun. Elvelia said she wanted to throw the gun in the river or turn it in. Detective Arnold interviewed Elvelia, who denied Sciutto's story about the gun.

Detective Arnold spoke to Celeste about some telephone calls she had received, starting on November 27, 1997. The caller identified himself as Prado, calling from jail. Prado told Celeste that she had not seen him, but she said she had. Computerized jail records showed that no call was ever placed to Celeste. However, a call was made by Prado to his sister, in which Prado gave his sister Celeste's telephone number and instructed her to call Celeste. In that conversation, Prado also asked his sister whether a gun had been found. Prado instructed his sister to set up a three-way conference call with Daniel T., who had been in custody with Guzman in Kern County.

Sheriff's Officer Tim Hudson spoke to Guzman when he was initially booked. Guzman waived his *Miranda* rights and said he was in a car with Chavez, that there was a gun in the car, but that neither he nor Chavez fired the gun. Officer Hudson also spoke to Chavez who waived his *Miranda* rights. Chavez admitted driving the car and that there were two guns in the car. Chavez claimed that when they went to look for the Dodge Neon, he had no knowledge there were guns in the car, but he admitted that shots were fired at the Dodge Neon.

Daniel T. was in custody at juvenile hall and spoke to Guzman about the shooting. Guzman told Daniel he was in custody for a drive-by shooting and that he was the shooter. He also said that they meant to shoot some guys but a girl was in the crossfire.

District Attorney Investigator Vickie Currier spoke to Daniel, who claimed Guzman told Daniel that he was the shooter. In addition, she spoke with Barry M., who

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[5]Elvelia invoked her privilege against self-incrimination and was not available as a witness at trial.

also claimed Guzman told him he was the shooter. Barry said his cellmate, Chavez, was the driver and did not know there were any guns in the car, but that he was just going to fight some other guys.

Barry testified he was in custody in 1997 with some individuals who were discussing a drive-by shooting. Barry spoke to a female investigator prior to trial. Barry's cellmate, who he believed was Chavez, was involved in the shooting and talked about the shooting a little bit. At trial, Barry could not remember the initial conversation, nor could he recall what he told the investigator. Barry denied knowing Guzman and denied speaking to him about the murder. Barry denied making various statements to Investigator Currier and claimed not to remember other statements.

Detective Arnold participated in the search of Prado's house. He found a nine-millimeter gun in the attic.

Celeste testified that a few days after the shooting, Prado called her but initially identified himself as someone else. After giving his identity as Prado, he told her, "'You didn't see me in there.'" Celeste responded, "Yeah, I did see you. I looked straight at you."

Department of Justice Criminalist Stephen O'Clair examined the physical evidence in the case to determine bullet trajectories and the order of fire. O'Clair determined that two weapons fired at the Neon, and that the bullets which hit Romero and Ray were fired from the same weapon. O'Clair opined that the nine-millimeter bullet hit Shalisa. O'Clair concluded that four bullets hit the Neon, and that at least three bullets fired missed the car altogether. He could not reconcile the apparent trajectory of the bullets with the wound to Romero based on the reports of how the victims were seated in the car.

The nine-millimeter pistol found at Prado's residence did not fire any of the bullets in connection with the crime. O'Clair examined another pistol, a nine-millimeter Luger, and concluded it probably did not fire the nine-millimeter bullet found in the

Neon. All of the .38 cartridges found at the scene were fired from the same gun that fired the .38 cartridges found in Prado's backyard.

Roger Peterson, a forensic toxicologist, examined the blood samples. Big Alex, Prado, Celeste, Ray, Joseph and Chavez had no alcohol or drugs in their blood. Shalisa had no drugs, but had a blood-alcohol level of 0.09 percent at 5:50 a.m. on November 23, 1997. Peterson opined that at 1:00 a.m., her blood-alcohol level would have been approximately 0.19 percent. Guzman had methamphetamine in his blood, indicating recent drug usage. He had no alcohol in his system.

Leticia Chavez, Chavez's mother, was working on the night of the shooting. Around 11:00 p.m., Chavez came to his mother's workplace and picked up her 1997 silver Honda Civic, saying he needed it to get home. Leticia knew her son was not old enough to drive, but she allowed him to use the car anyway. There were no guns or bullets in her car when she gave it to him. Leticia had previously seen her son with Prado.

DEFENSE

A private investigator, Gordon Scott Dinkins, testified that he had interviewed Barry M., who told him Chavez had said he did not know about the guns but that he just thought there was going to be a fight. Chavez was reported to be scared and shocked once he heard gunshots.

Chavez testified in his own defense. He stated that when he, Big Alex and Esquivel were driving, the people in the Dodge Neon started to get mad at them. Chavez stated he pulled into the car wash, as instructed by the person driving the Neon, but left when a large group of people approached their car. Chavez stated they returned to Prado's house for awhile, and then went cruising on Olive with Prado and Guzman. Chavez testified the driver of the Dodge Neon told him to follow him, so he did, on to Highway 65. Chavez stated that when they were on the highway, the girl in the back seat stuck her hand out of the window with what looked like a gun. Chavez put on the brakes and turned quickly. He heard a gunshot, then looked to his side and saw Prado bringing a

gun into the car. Chavez looked behind him and saw Guzman shooting. Chavez stated Prado was sitting in the right front seat. Guzman was sitting in the right rear seat.

Chavez testified he was willing to fight the driver of the Dodge Neon. He also testified both Guzman and Prado had guns. Chavez admitted placing a cloth on the hood of his car to conceal it from the police. Guzman told Chavez he did not mean to shoot anyone. Chavez admitted he never told the police he thought the victims had a gun.

Chavez claimed he did not know of the guns until the shooting started. However, later in his testimony, he was equivocal as to whether he saw a gun being brought into the car when he, Prado and Guzman left Prado's house. Chavez also gave inconsistent testimony about whether he discussed the first encounter with the Dodge Neon while at Prado's house with Prado and Guzman. He acknowledged telling police that the three of them left the house to look for the Neon. In his statement to the police, Chavez had stated he and Prado and Guzman planned to beat up the guys in the Dodge Neon, but he denied planning the shooting.

Guzman testified in his own defense. He stated he had known Prado for two years, and had stayed at Prado's house for two days prior to the shooting. Guzman testified that Prado had never shown him any firearms prior to the day of the shooting. Guzman had previously been shooting with his uncle, but he did not have a firearm on the day of the shooting. Guzman stated that when Chavez returned after his first encounter with the Dodge Neon, Chavez did not mention any confrontation. Guzman denied Chavez asked for help to "go out and kick someone's ass." Guzman claimed that when he and Chavez and Prado got into the car to go cruising, he was unaware of any guns in the car.

Guzman denied there was a plan to look for the Dodge Neon. Guzman claimed that Chavez at no point indicated he had a problem with anyone in another car. According to Guzman, the three simply ended up on the highway following the Dodge Neon. No one in the Dodge Neon was yelling anything at them. When they pulled up beside the Dodge Neon, Guzman saw a gun sticking out of the back passenger area of the

Dodge Neon, pointed at them. Later he admitted he was uncertain whether he had seen a gun. Guzman stated he scooted over in the seat, away from the window nearest the Dodge Neon. He heard gunshots coming from the Dodge Neon and also from the front of the vehicle he was in. Guzman stated he found a gun between the front seats and picked it up. He stuck the gun out the window and fired it without aiming at anything. He did not intend to hurt or kill anyone. Guzman testified he did not remember whether he left the gun in the car or brought it back into Prado's house when they returned.

Guzman testified that during the entire night of the shooting, he consumed a total of five beers. Guzman denied speaking with Officer Hudson, Daniel T., or Barry M. Guzman denied hearing Chavez say anything about a black Neon prior to the shooting.

REBUTTAL

Chavez told Detective Arnold that upon returning to Prado's house after the shooting, he saw Guzman hand the gun to Prado. Chavez told his friends to get rid of the guns.

DISCUSSION

1. PRADO, GUZMAN AND CHAVEZ CONTEND THE HOMICIDE INSTRUCTIONS WERE LEGALLY ERRONEOUS, AS THEY WERE INTERNALLY INCONSISTENT AND UNINTELLIGIBLE WHEN VIEWED AS A WHOLE

Section 187 defines the crime of murder as the "unlawful killing of a human being … with malice aforethought." (§ 187, subd. (a).) Malice aforethought "may be express or implied." (§ 188.) "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) Proof of unlawful "intent to kill" is the functional equivalent of express malice. (*People v. Swain* (1996) 12 Cal.4th 593, 601.)

Section 189 states, in relevant part:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the

> perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.…"

First degree murder was presented to the jury on two theories: premeditated and deliberated murder with express malice, and "drive-by" murder, or "murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death." Second degree murder was presented to the jury on the theories of implied malice, intentional discharge of a firearm from a vehicle with the specific intent to inflict great bodily injury, second degree felony murder, and a theory of natural and probable consequences.

Appellants contend the trial court erred in instructing the jury on first degree felony murder as the drive-by shooting component of section 189 is not an enumerated felony under the felony-murder rule. Specifically, they argue that section 189, which specifies that "any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree" presupposes that the jury first find "murder," i.e., malice aforethought. Appellants contend section 189 is only to be used to fix the degree of murder once malice has been established. In other words, appellants claim the jury was never told it must first find appellants guilty of murder with malice aforethought before considering whether the killing was committed as a drive-by shooting, rendering the crime murder of the first degree.

Respondent argues that the drive-by shooting clause in section 189 is intended to operate as the functional equivalent of an enumerated felony under the felony-murder rule, and the trial court's instructions were therefore correct. Assuming arguendo that the drive-by shooting clause of section 189 does not define an additional count of felonious

conduct for purposes of the felony-murder rule, respondent contends the jury necessarily found malice, and subsequently no prejudice resulted from the giving of the instructions.

Appellants' argument presents two distinct questions: (1) does the drive-by shooting clause of section 189 define an additional enumerated felony within the felony-murder rule; and (2) were the instructions, as given, internally inconsistent and, if so, were they prejudicial. We address each issue in turn.

A. Is the drive-by shooting clause of section 189 an enumerated felony for purposes of the felony-murder rule?

No case authority appears to exist which addresses the issue of whether the drive-by shooting clause of section 189 creates an additional enumerated felony for purposes of the felony-murder rule. Various cases have addressed components of the argument. From these cases, from the language of the statute itself and from the legislative history of the clause, it appears that the drive-by shooting provision of section 189 is not an enumerated felony for purposes of the felony-murder rule, but does eliminate the element of premeditation to find first degree murder. The clause creates somewhat of a hybrid, requiring that there be a finding of intent to inflict death while firing intentionally from a vehicle at another person outside of the vehicle.

For purposes of this discussion, we will begin with the explanation in *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163-164 that section 189 establishes three categories of first degree murder:

> "Section 189 … first establishes a category of first degree murder consisting of various types of premeditated killings, and specifies certain circumstances (use of explosives or armor-piercing ammunition, torture, etc.) which are deemed the equivalent of premeditation. Section 189 secondly establishes a category of first degree felony murders (murders perpetrated during felonies or attempted felonies such as arson, rape, carjacking, etc.). Finally, section 189 establishes a third category consisting of only one item, intentional murder by shooting out of a vehicle with intent to kill."

We will refer to the three different clauses of section 189 as differentiated above.

Respondent contends that a killing committed in the course of a drive-by shooting fits within the second clause; that it adds to the list of enumerated felonies within the felony-murder rule. In order to address this argument, we first explain the felony-murder rule and its purpose.

Under the felony-murder rule, a killing, whether intentional or unintentional, is first degree murder if committed in the perpetration of, or the attempt to perpetrate, certain serious felonies. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 134, p. 750.) The ordinary elements of first degree murder—malice and premeditation—are eliminated by the doctrine. The only criminal intent required to be proved is the specific intent to commit the particular underlying felony. (*Id.*, § 135, pp. 750-751.)

The difference between deliberate, premeditated first degree murder and that of first degree felony murder has been explained by our high court as follows:

> "As pertinent here, '[a]ll murder which is perpetrated … by any … kind of willful, deliberate, and premeditated killing … is murder of the first degree ….' (Pen. Code, § 189.) The mental state required is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See *id*., §§ 187, subd. (a), 189.)
>
> "Similarly, '[a]ll murder … which is committed in the perpetration of, or attempt to perpetrate,' certain enumerated felonies [enumerated in Penal Code section 189] … 'is murder of the first degree ….' (Pen. Code, § 189.) The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. [Citations.] There is no requirement of a strict 'causal' [citation] or 'temporal' [citation] relationship between the 'felony' and the 'murder.' All that is demanded is that the two 'are parts of one continuous transaction.' [Citations.] There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

As this description demonstrates, "'[f]elony murder and premeditated murder are not distinct crimes; rather, they constitute "two kinds of first degree murder" requiring different elements of proof.'" (*People v. Davis* (1995) 10 Cal.4th 463, 514.) "'Under

well-settled principles of criminal liability a person who kills—whether or not he is engaged in an independent felony at the time—is guilty of murder *if he acts with malice aforethought*. The felony-murder doctrine, whose ostensible purpose is to deter those engaged in felonies from killing negligently or accidentally, operates to posit the existence of that crucial mental state—and thereby render irrelevant evidence of actual malice or the lack thereof—when the killer is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it.' [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 308 (maj. opn. of George, J.); but see *id*. at p. 321 (conc. and dis. opn. of Mosk, J.) [felony-murder rule does not impute element of malice aforethought, it omits it].)

As explained in *People v. Ireland* (1969) 70 Cal.2d 522, 538, written before a number of felonies were added to the felony-murder doctrine:

> "The felony-murder rule operates (1) to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of *all* felonies inherently dangerous to human life, and (2) to posit the existence of malice aforethought *and* to classify the offense as murder of the first degree in homicides which are the direct causal result of those six felonies specifically enumerated in section 189 of the Penal Code. [Citations.] Thus, 'A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second degree murder.' [Citation.]"

The purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or accidentally. (See *People v. Smith* (1984) 35 Cal.3d 798, 803.) Ordinarily, the felony-murder rule is inapplicable when based on a felony which is an integral part of and included in fact within the homicide. (*People v. Hernandez* (1985) 169 Cal.App.3d 282, 287-288.) For example, the doctrine does not apply where the purpose of the underlying felony is assault which results in death. (*People v. Ireland*, *supra*, 70 Cal.2d at pp. 538-540.) The doctrine may apply even if the felony was included in the facts of the homicide, and was integral thereto, if that felony was committed with an independent felonious purpose. For instance, in the case of an armed

robbery, the underlying purpose is to acquire money or property belonging to another. (*People v. Smith*, *supra*, 35 Cal.3d at pp. 805-806; *People v. Hernandez*, *supra*, 169 Cal.App.3d at p. 288.)

Our Supreme Court in *People v. Dillon* (1983) 34 Cal.3d 441 fully explained the history of felony murder when the defendant challenged the basis of the felony-murder rule and asked that the court abolish it as a holdover from the common law. The *Dillon* court, after an exhaustive analysis, declined and concluded that the term "murder" in section 189 has more than one meaning. For those murders in the first clause (premeditated and deliberate murders), murder is the term of art generally accepted in criminal law, i.e., a killing with malice aforethought. "Murder" as it is used in the second clause (felony murder), means simply "killing," with no malice component. (*Id.* at pp. 472-476; see also *People v. Hernandez*, *supra*, 169 Cal.App.3d at p. 287.)

In *Dillon*, the court in a footnote observed that:

> "We recognize that from the standpoint of consistency the outcome of this analysis leaves much to be desired. Although the misdemeanor-manslaughter rule is plainly a creature of statute (Pen. Code, § 192, par. 2), we reach the same conclusion as to the first degree felony-murder rule only by piling inference on inference; and the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code (see *People v. Phillips* (1966) 64 Cal.2d 574, 582, and cases cited). A thorough legislative reconsideration of the whole subject would seem to be in order." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, fn. 19.)

Despite this invitation to clarify the matter, the Legislature has not done so in the almost 19 years since *Dillon* was decided. The clause at issue was added in 1993, long after the analysis of *Dillon*.

To determine whether the drive-by shooting clause of section 189 falls within the felony-murder clause of section 189, we interpret the clause in light of well-established principles of statutory construction. The starting point for statutory construction is "the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) Penal

Code sections must generally be construed "'according to the fair import of their terms, with a view to effect [their] objects and to promote justice.'" (*In re Smith* (1966) 64 Cal.2d 437, 440.) Consistent with that general principle, it is necessary to examine at the outset the language of the code section to determine if the words used unequivocally express the Legislature's intent. (*People v. Woodhead*, *supra*, at p. 1007; *People v. Craft* (1986) 41 Cal.3d 554, 560.) "If no ambiguity, uncertainty, or doubt about the meaning of the statute appear, the provision is to be applied according to its terms without further judicial construction. [Citation.]" (*Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156.) However, when language in the statute is unclear, ambiguous or susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, and the statutory scheme of which the statute is a part. (*People v. Bartlett* (1990) 226 Cal.App.3d 244, 250.)

Applying these principles of statutory construction to the provision at issue in the present case, "we find that the language of the code itself carries us a considerable distance." (*Morse v. Municipal Court*, *supra*, 13 Cal.3d at p. 156.) Although the drive-by shooting clause is listed immediately following the enumerated felonies included in the felony-murder rule, it is distinct in that it requires an "intent to inflict death" not required in the preceding felonies by operation of the felony-murder rule.

This interpretation has been followed, albeit in dicta, in several cases. As the court in *Rodriguez*, *supra*, explained, section 189 requires that the shooting out of a vehicle be both "'intentionally at another person'" and "'with the intent to inflict death.'" (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 164, fn. 5.) In *Rodriguez*, the defendant and the victim, in separate cars, had had an argument in a parking lot. The victim tried to leave the scene, but the defendant pursued him and shots were fired. The victim died as a result of the shooting. No gun was found in the victim's car. (*Id.* at p. 162.) The defendant was convicted of first degree murder, based on grounds of intentionally shooting from a vehicle with the intent to kill. (*Id.* at p. 163.) The issue in

Rodriguez was the constitutionality of section 190.2, subdivision (a)(21), which allowed for the defendant's sentence of life without possibility of parole based on an unpremeditated murder. (*Id.* at pp. 164-166)

In *People v. Sanchez* (2001) 26 Cal.4th 834, the defendant was in a car when he shot at a rival gang member, Gonzalez, who returned fire. A bullet hit and killed an innocent bystander. The defendant and Gonzalez were both charged with murder and it was specially alleged, as to the defendant, that the murder was committed by discharging a firearm from a motor vehicle (§§ 187, 12022.55). The prosecution proceeded on two theories: as to both the defendant and Gonzalez, premeditated first degree murder; in addition, as to the defendant, first degree murder perpetrated by means of intentionally discharging a firearm from a motor vehicle with the specific intent to inflict death, pursuant to section 189. (*People v. Sanchez*, *supra*, at p. 838.) The issue in *Sanchez*, which is not at issue here, was one of concurrent causation or transferred intent in a single-fatal-bullet case. (*Id.* at p. 839.) However, one of the court's statements is helpful to our analysis. Our high court stated,

> "Although in this case it could not be determined who was the direct or actual shooter of the single fatal round, the evidence, with all reasonable inferences drawn in favor of the guilty verdicts, supports a finding that defendant's commission of life-threatening deadly acts in connection with his attempt on Gonzalez's life was a substantial concurrent, and hence proximate, cause of [the victim's] death. All that remained to be proved was defendant's culpable mens rea (premeditation and malice) in order to support his conviction of premeditated first degree murder. *Even without a showing of premeditation*, *if defendant was shown to have intentionally discharged his firearm from a motor vehicle with the specific intent to inflict death*, *then his crime was murder in the first degree by operation of section 189*." (26 Cal.4th at pp. 848-849, italics added.)

Our Supreme Court in *Sanchez* further discussed the drive-by shooting clause of section 189 in several footnotes. At one point, the court stated, "In defendant's case, the question of premeditation aside, if he was found to have intentionally discharged a firearm from a motor vehicle with the specific intent to inflict death, then by operation of section 189, such circumstance afforded a separate basis for the first degree murder

conviction." (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 851, fn. 10.) At another point, the court stated, "As we have noted, under the provisions of section 189, on which the jury was also instructed, defendant need not have been found to have acted with premeditation in order to be held liable for first degree murder on a finding that he intentionally discharged his firearm from a motor vehicle with the intent to inflict death." (*Id.* at p. 853, fn. 11.)

Respondent argues that one court, at least in dicta, seems to have concluded shooting from a vehicle is an enumerated felony within the felony-murder rule. In *People v. Baker* (1999) 74 Cal.App.4th 243, the defendants were charged with murder, attempted murder, assault with a deadly weapon, conspiracy to commit assault with a deadly weapon and residential burglary. (*Id.* at p. 247.) The defendants claimed the instruction presented to the jury on the theory of conspiracy felony murder was legally insufficient, as assault with a deadly weapon was not one of the listed felonies. (*Id.* at p. 248.) The court in *Baker* agreed and reversed the judgment. (*Ibid.*) As explained by the court in *Baker*:

> "[T]he only way a conspiracy to commit an assault with a deadly weapon may result in a first degree murder is if a conspirator is guilty of first degree murder as set forth in section 189. In the present case, the murder was not committed by use of an explosive device, armor-piercing ammunition, poison, lying in wait, or torture. Nor was it committed in the course of arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, various sex crimes, *or shooting from a vehicle*. Therefore, the only possibility of a 'fit' under section 189 is if one of the conspirators was found to have committed a 'willful, deliberate, and premeditated murder.' Any instruction to the contrary was error." (74 Cal.App.4th at p. 250, fn. omitted, italics added.)

This particular language in *Baker*, however, cannot be read to make "shooting from a vehicle" an enumerated felony for purposes of the felony-murder rule. One further note, *Baker* and *Rodriguez* were both decided by the Second Appellate District, Division Two. To read into *Baker* what respondent wishes us to would seem to fly in the face of what the court stated earlier in *Rodriguez*.

For a more definitive meaning of the statute, we can look to relevant legislative history. Senate Bill No. 310 was enacted in 1993, amending sections 189, 190 and 12022.5. (§ 189, as amended by Stats. 1993, ch. 609, § 1, p. 3265.) Senator Ayala introduced the bill, stating the following, in pertinent part:

> "… Existing law describes murder of the 1st degree as all murders which, among other things, are committed in the perpetration of, or attempt to perpetrate, certain enumerated felonies and specified sex crimes. [¶] This bill would add to the list of specified crimes a murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." (Legis. Counsel's Dig., Sen. Bill. No. 310, 5 Stats. 1993 (1993-1994 Reg. Sess.) Summary Dig., p. 236.)

When the bill was signed by Governor Wilson on September 29, 1993, Governor Wilson issued the following signature message regarding Senate Bill No. 310 (Stats. 1993, ch. 609):

> "To the Members of the California Senate:
>
> "I have signed this date Senate Bill No. 310 which I have sponsored.
>
> "This bill adds intentional drive-by killing to the first degree murder statute and increases the penalty for second degree drive-by murder by five years to twenty years to life. Additionally, this bill imposes a sentence enhancement of up to five years for the use of the firearm.
>
> "This bill represents substantial progress in the effort to curb and punish senseless acts of violence perpetrated on innocent, and often random, victims.
>
> "The codification of drive-by killing in the first degree murder statute allows prosecutors to convict drive-by assassins upon proof of a specific intent to kill. The penalty for this act of cowardice in the first degree can be as high as 30 years to life with the application of the penalty enhancement provided in this bill." (Historical and Statutory Notes, 47A West's Ann. Penal Code (1999 ed.) foll. § 189, p. 93.)

Several observations and conclusions may be derived from the legislative history of the drive-by shooting clause of section 189. Although Senator Ayala's statement seems to add drive-by shooting to a list of other felonies, it is also accompanied by the

wording requiring a finding of an "intent to inflict death," thereby necessarily differentiating it from the rest of the list of felonies. In addition, drive-by shooting is itself not a felony in the traditional sense in that it is not neatly labeled as a crime, such as carjacking or robbery, and it is not identified in a specific section of the Penal Code, as are the specific sex crimes listed in section 189. (See, e.g., §§ 206, 211, 215, 288.) Governor Wilson's statement also makes clear that the conduct is differentiated from the other felonies listed in that it includes the need of "proof of a specific intent to kill."

Finally, when a penal statute is susceptible of two reasonable constructions, it must be construed "as favorably to the defendant as its language and the circumstances of its application may reasonably permit …." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) "Strict construction of penal statutes protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

Accordingly, we find that the drive-by shooting clause which was added to section 189 in 1993 is not an enumerated felony for purposes of the felony-murder rule. We further find that although premeditation is not required for a finding of guilt of first degree murder under this clause of the section, a finding of "a specific intent to kill" is required. As noted above, proof of unlawful "intent to kill" is the functional equivalent of express malice. (*People v. Swain*, *supra*, 12 Cal.4th at p. 601.)

B. Were the jury instructions as given internally inconsistent and incorrect, and if so, were they prejudicial?

Appellants next contend that the instructions presented to the jury on the theory of felony murder were incorrect and inconsistent. The trial court instructed the jury with a modified version of CALJIC No. 8.21, defining felony murder, as follows:

> "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle, when the perpetrator specifically intended to inflict death, is murder of the first degree when the

> perpetrator had the specific intent to commit that crime. The specific intent for that crime and the commission or attempted commission of such crime must be proved beyond a reasonable doubt."

The jury was further instructed with a modified version of CALJIC No. 8.27 (1998 rev.), which defined felony murder under an aider and abettor theory, as follows:

> "If a human being is killed by any one of several persons engaged in the commission or attempted commission of [the crime of] discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death, all persons who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of admitting, encouraging or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or device its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental. [¶] In order to be guilty of murder as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the discharging of a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death at the time the fatal wound was inflicted. [¶] However, an aider and abettor may still be jointly responsible for the commission of the underlying felony based upon other principles of law which will be given to you."

Appellants are correct. In light of the discussion above, felony-murder instructions were not appropriate in this situation. Furthermore, the felony-murder instructions that were given were modified and contained confusing and contradictory language.

In essence, the jury was given conflicting instructions on the mental state element of the alleged offenses. Such instructions can act to remove the necessary mental state element of an alleged offense from the jury's consideration, and as such, the instructions constitute a denial of federal due process and invoke the *Chapman v. California* (1967) 386 U.S. 18 "beyond a reasonable doubt" standard for assessing prejudice. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Lee* (1987) 43 Cal.3d 666, 673-674; *People v. Self* (1993) 12 Cal.App.4th 1222, 1226-1227.)

In *Lee*, the alleged offense was attempted murder, which requires the mental state element of a specific intent to kill. (*People v. Lee*, *supra*, 43 Cal.3d at p. 670.) The trial court in *Lee* instructed the jury on this requirement element, but also provided "implied malice" instructions which permitted dispensing with an actual specific intent to kill. (*Id.* at pp. 669-670.) The high court in *Lee* concluded that the appropriate standard of review in determining whether such instructional error is prejudicial is the "harmless beyond a reasonable doubt" test for federal constitutional errors. (*Id.* at p. 674; *Chapman v. California*, *supra*, 386 U.S. at pp. 24-25.) As the *Lee* court explained, "[C]onflicting instructions, which appear to require a specific intent to kill but which eliminate that requirement where implied malice is found, are closely akin to instructions which completely remove the intent issue from the jury's consideration: If the implied malice instructions are followed, the issue of intent may indeed be removed from the case." (*People v. Lee*, *supra*, 43 Cal.3d at p. 674.)

Similarly, if some jurors here chose to follow parts of CALJIC Nos. 8.21 and 8.27 regarding the murder offenses, particularly focusing on the "unintentional or accidental" language of those instructions, this could have removed the mental state element from these offenses. Consequently, we must determine whether the error in giving these instructions was harmless beyond a reasonable doubt.

In making this determination of harmlessness, we must ask "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) And "[t]o say that an error did not contribute to the verdict is … to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, at p. 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the proper *Chapman* inquiry is whether the guilty verdict actually rendered in the trial at hand was surely unattributable to the error].) Significant in this regard is whether the evidence is "'of such compelling force as to show

beyond a reasonable doubt' that the erroneous instruction 'must have made no difference in reaching the verdict obtained.'" (*People v. Harris* (1994) 9 Cal.4th 407, 431, quoting *Yates v. Evatt*, *supra*, at p. 407.) Employing this standard, we can say the error was harmless.

It should first be noted that the correct murder instructions were also given. CALJIC No. 8.10, which defines murder, was given as modified:

> "The defendants are accused in Count 1 of the Information of the crime of murder, a violation of Penal Code Section 187. Every person who unlawfully kills a human being with malice aforethought or was perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, or it occurred during the commission of the crime of shooting at an occupied vehicle which is a felony inherently dangerous to human life, is guilty of the crime of murder, a violation of Penal Code section 187. [¶] A killing is unlawful if it was neither justifiable nor excusable. In order to prove the crime of murder, each of the following elements must be proved: One, a human being was killed; two, the killing was unlawful; three, the killing was done with malice aforethought or was perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death or occurred during the commission of a felony inherently dangerous to human life."

In addition, CALJIC No. 8.25.1 was given, which states:

> "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally and at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree."

CALJIC No. 3.31, concurrence of act and specific intent, was given, as was CALJIC No. 3.31.5, which defines mental state. Malice aforethought was defined in CALJIC No. 8.11; deliberate and premeditated murder was defined in CALJIC No. 8.20. Also given was CALJIC No. 3.01, defining aiding and abetting and the requirement that the aider and abettor act with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing or encouraging the commission of the crime.

Closing arguments to the jury can be a relevant consideration in the prejudice equation. (See *People v. Lee*, *supra*, 43 Cal.3d at p. 677.) Here, the prosecutor, in closing, stated in part:

> "With respect to first degree murder, there is express malice first degree murder, things that you look for with respect to express malice first degree murder are the number of bullets that went into this particular vehicle, the location of where the bullet holes were, the hunting down of the victims.…
>
> "The reason that the prosecution spent a significant amount of time with respect to what occurred prior to the actual shooting, is to show the intent of these three defendants, the intent to go after these victims, to hunt them down, loaded with weapons in their car, and to kill them.
>
> "With respect to first degree express malice, premeditation means it has to be considered beforehand. There's no timetable. The law does not say they have to think about it for 30 minutes before they do it. You have to take a look at all the factors that exist prior to the shooting, prior to this killing. Deliberations weighs—when an individual weighs the pros and cons having the consequences in mind, decides to and does kill.
>
> "Premeditation and deliberation, it's not a duration of time, but it's an extent of the reflection. Again, I know all of these things are coming in. You have to try to look at the instructions and it will tell you what premeditated, deliberated first degree murder is.
>
> "The issue as to the intent to kill can be arrived at in a short period of time. Again, going back to the facts of this case, what led up to this killing, is extremely significant. But you can also take into consideration when determining whether an individual is guilty of first degree murder the actual shooting, the actual killing itself. Again, the reason that Steven O'Clair from Department of Justice came down and spent a significant amount of time with respect to where the bullet holes were in the car, which bullet hit which person, the opinion that he stated as to how many guns were used, all of that information is extremely significant and extremely relevant in determining whether an individual intended to kill someone, whether these defendants intended to kill someone."

The prosecutor further stated that if the jury found appellants guilty of first degree murder, it had to next find if the special circumstance were true, which "the prosecution has to prove beyond a reasonable doubt three elements." These elements were described

as first, "that the murder was perpetrated by means of discharging a firearm from a motor vehicle." Second, "the perpetrator intentionally discharged the firearm at another person or persons outside the vehicle." And third, "the perpetrator at the time he discharged the firearm intended to inflict death."

Later in the same argument, the prosecutor reiterated that she was relying on two theories with respect to first degree murder, and three with respect to second degree murder. The prosecutor described the first degree murder theories as follows:

> "[T]he first theory is that the defendants intended to kill the victims. That's first degree murder. If the killing was premeditated and deliberated, express malice.… [¶] …
>
> "Drive by murder is the second theory the prosecution presents to you for first degree murder. In essence, what that instruction says is murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death. That's murder in the first degree."

The only time the prosecutor stated a killing could be "intentional, unintentional, or accidental," was within the context of explaining second degree felony murder. The jury was instructed with CALJIC Nos. 8.32 and 8.34 on the theory of second degree felony murder.

Another consideration in the prejudice equation is the state of the evidence. (See *People v. Lee*, *supra*, 43 Cal.3d at p. 677; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1130-1131.) Under the theory that appellants discharged a firearm from a motor vehicle intentionally at another person outside the vehicle with the intent to inflict death, it was necessary to find an intent to unlawfully kill. "Malice is express when there is manifested an intention unlawfully to kill a human being." (CALJIC No. 8.11.) Express malice requires three things: (1) an intentional, (2) unlawful (3) killing of a human being. (*People v. Saille* (1991) 54 Cal.3d 1103, 1114 ["express malice and an intent unlawfully to kill are one and the same"].)

The evidence of appellants' intent to kill was quite strong. Chavez was in the car which first made contact with Joseph's car earlier in the evening. Big Alex, who was

also in the car, testified that Chavez was not happy because of their contact with Joseph's car.

Almost four hours later, Prado, Guzman and Chavez followed Joseph, this time onto the highway. Big Alex, in a third car, followed appellants' car at their request. Big Alex witnessed "flashes" coming from appellants' car.

When Chavez spoke to Officer Hudson after his arrest, he admitted driving the car and that there were two guns in the car. He also admitted appellants went out to look for Joseph's car. Daniel T., who was in custody with Guzman, testified that Guzman told him he had shot someone in a drive-by shooting and that the intended victim was "some guy." Barry M., who was also in custody, told an investigator that Guzman stated he was the shooter. He also said that Chavez did not know there were guns in the car but that they had gone to fight "some other guys."

At trial, Chavez admitted he was willing to fight Joseph and that both Guzman and Prado had guns. He was equivocal as to whether he had discussed the first encounter with Joseph's car while at Prado's house. He acknowledged telling the police that he, Prado and Guzman left the house to look for Joseph's car.

On the evidence before the jury in this case, we do not have a reasonable doubt whether appellants had a specific intent to kill when the evidence shows they armed themselves, specifically set out to find and follow Joseph's car onto the highway, and then repeatedly fired into Joseph's vehicle.

Given the number of times the court told the jury a conviction of murder required proof of a specific intent to kill, and the consistent argument of counsel directed at the requirement of intent to kill, along with instructions that specific intent to kill while firing intentionally at a person outside the vehicle had to be proven by the prosecution, we conclude beyond a reasonable doubt that the jury believed proof of intent to kill was required to find appellants guilty of murder in the first degree. The instructional error was therefore harmless beyond a reasonable doubt. (See *People v. Visciotti* (1992) 2

Cal.4th 1, 58-59 [misleading instructions relating to intent to kill as to charge of attempted murder harmless beyond a reasonable doubt].)

2. PRADO AND GUZMAN CONTEND THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THAT INTENT TO AID THE PERPETRATOR OF THE HOMICIDE MUST HAVE ARISEN BEFORE OR DURING THE PERPETRATOR'S COMMISSION OF THE OFFENSE*

Prado and Guzman claim the trial court failed to adequately instruct the jury on the timing requirements of aider and abettor liability. Specifically, they argue that the jury should have been instructed the intent to aid the perpetrator must arise prior to or during the perpetrator's commission of the offense. Prado and Guzman rely on *People v. Esquivel* (1994) 28 Cal.App.4th 1386 for this proposition.

In *People v. Esquivel*, the defendant was found guilty of first degree murder based on the felony-murder theory. There was some evidence presented from which the jury could have found that the robbery of the victim occurred after the victim died and that the defendant aided only in the robbery. The prosecutor argued that the defendant was guilty of felony murder even if he did not join in the plan to rob until after the murder, so long as one of his codefendants did plan to rob the victim before the murder. (*People v. Esquivel*, *supra*, 28 Cal.App.4th at p. 1394.)

On appeal the defendant argued the instructions given were erroneous because no instruction informed the jury that the defendant had to have formed the intent to participate in the robbery before the murder was committed in order to be found guilty of felony murder. (*People v. Esquivel*, *supra*, 28 Cal.App.4th at pp. 1389, 1394.) The court in *Esquivel* agreed, finding the instructions, as given, failed to give the jury the opportunity to decide if the defendant had the requisite intent before or after the killing. (*Id.* at p. 1400.)

In *People v. Pulido* (1997) 15 Cal.4th 713, 726, our Supreme Court agreed with *Esquivel*'s substantive holding that an aider and abettor who assists in a robbery after the

*See footnote, *ante*, page 1.

killing occurs is not subject to liability for felony murder. However, *Pulido* did not reach the issue of whether a sua sponte instruction was required, because the jury resolved the factual question posed by the omitted instruction adversely to Pulido by returning a true finding on a robbery-murder special circumstance. (*Id.* at p. 716.)

Guzman and Prado's reliance upon *Esquivel* is misplaced. *Esquivel* was based on a circumstance present only in the context of robbery felony murder. As explained above, the felony-murder doctrine was not applicable here. The jury was instructed on an aider and abettor theory with CALJIC No. 3.01 as follows:

> "A person aids and abets the commission or attempted commission of a crime when he, one, with knowledge of the unlawful purpose of the perpetrator, and, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and three, by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that the crime is being committed and the failure to prevent it does not amount to aiding and abetting."

Appellants did not object to CALJIC No. 3.01 nor request further instruction on aiding and abetting liability. Neither did the prosecution advance the theory that any of the appellants were liable for any actions taken after the shooting, nor was there any evidence to support such a theory. In fact, as to Chavez, who does not join in this particular argument, CALJIC No. 3.01 was modified to add the following:

> "Any assistance offered by … Chavez to any other defendant after the crime has been committed is insufficient to establish that he aided and abetted the perpetrators in the commission of the crime."

In *People v. Williams* (1997) 16 Cal.4th 635, the defendant was charged with four murders that he committed with two companions. (*Id.* at p. 647.) On appeal, the defendant claimed CALJIC No. 3.01 was ambiguous in that it did not clarify that the intent of an aider and abettor necessarily must be formed before or during the actual offense and not after. (*People v. Williams*, *supra*, at p. 675.) Our Supreme Court in *Williams* rejected the contention, stating, "We discern no such ambiguity." (*Ibid.*)

Neither do we, and we reject Prado and Guzman's contention to the contrary.

3. PRADO, GUZMAN AND CHAVEZ CONTEND THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THAT EACH APPELLANT MUST HAVE INTENDED TO KILL FOR THE SPECIAL CIRCUMSTANCE TO BE FOUND TRUE*

The information alleged that, as to each appellant, the murder was committed by means set forth in section 190.2, subdivision (a)(21): "The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." Section 190.2, subdivision (c) provides:

> "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4."

Hence, the drive-by special circumstance can be applied to an aider and abettor only upon proof he or she harbored the intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 688, fn. 21.)

Appellants contend the instructions given were flawed because they failed to require a finding that each appellant intended to kill even if he only aided and abetted in the murder. Respondent acknowledges that there was instructional error, but submits that under the facts and circumstances of this case, the error was harmless, at least as to Prado and Guzman.

The special circumstance instruction, CALJIC No. 8.80.1 (1997 rev.), as given, stated:

> "If you find a defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true [or not true]: Intentional discharge of a firearm from a motor vehicle. The People have the burden of proving the truth of this special

*See footnote, *ante*, page 1.

circumstance. If you have a reasonable doubt as to whether this special circumstance is true, you must find it to be not true.

"You must decide separately as to each of the defendants the existence or nonexistence of the special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your finding as to the one or more which you agree.

"… [I]n order to find a special circumstance alleged in this case to be true or not true, you must agree unanimously. That special circumstance, once again, is discharging a firearm from a motor vehicle intentionally at another person outside the vehicle intending to inflict death. You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied."

The portion of the instruction which should have been given, but was not, states, in pertinent part:

"If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder in the first degree …." (CALJIC No. 8.80.1.)

The court did further instruct pursuant to CALJIC No. 8.81.21:

"To find the special circumstance referred to in these instructions as murder by means of an intentional discharge of a firearm from a motor vehicle is true, it must be proved, one, a murder was perpetrated by means of discharging a firearm from a motor vehicle; two, the perpetrator intentionally discharged the firearm at a person or another person outside of the vehicle; and three, the perpetrator at the time he discharged the firearm intended to inflict death."

The special circumstance alleged here included an element of an intent to kill. Our Supreme Court has consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California*, *supra*, 386 U.S. 18, 24. (*People v. Williams*, *supra*, 16 Cal.4th at p. 689; *People v. Osband* (1996) 13 Cal.4th 622, 681; *People v. Johnson* (1993) 6 Cal.4th 1, 45.) When there is evidence from which

a jury could base its verdict on the theory that a defendant was a mere aider and abettor to a murder, the trial court must instruct the jury that it must find the defendant, if not the actual killer, nevertheless intended to kill. (*People v. Hardy* (1992) 2 Cal.4th 86, 192; *People v. Garrison* (1989) 47 Cal.3d 746, 789.) Failure to so instruct does not require reversal if this court concludes the error is harmless beyond a reasonable doubt. (*People v. Garrison*, *supra*, at p. 789; *Chapman v. California*, *supra*, at p. 24.)

Such error may be harmless when this court is able to conclude that in determining the truth of the special circumstance allegation, the jury necessarily found an intent to kill under other properly given jury instructions or the intent to kill was "'overwhelming'" and the jury returning the special circumstance finding "'could have had no reasonable doubt'" that the defendant had the intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.) Based on the evidence as presented at trial, there is no doubt that Prado and Guzman were the actual shooters, and not aiders and abettors. The special allegation findings by the jury of personal firearm use and personal infliction of great bodily injury on victims Ray and Shalisa removes any doubt on this point. As such, the jury found that both Guzman and Prado, as shooters, were guilty of "discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (§ 190.2, subd. (a)(21).) There is no question but that the jury, under the instructions given for the underlying murder conviction, and based on the evidence at trial, necessarily found an intent to kill. It follows that the instructional error in failing to require the jury to make the same finding as to the special circumstance as to Guzman and Prado was harmless.

As to Chavez, the question is more complicated. That complication has been somewhat compounded by respondent's concession during oral argument that the special circumstance must be struck as to Chavez. Respondent's concession was based on the erroneous assumption that Chavez's conviction of first degree murder could have been based on the "natural and probable consequences" theory of aider and abettor liability, thus eliminating the "intent to kill" requirement for the application of the special

circumstance as to him. As pointed out below, we disagree. (*Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438, 449 [reviewing court not bound to accept concessions of parties as establishing the law applicable to a case].)

The prosecution's argument at trial was that Chavez was an aider and abettor. There is credible evidence that Chavez was the driver of the vehicle from which the shots were fired. There is also evidence that he, Prado and Guzman left the house intentionally looking for Joseph's car.

Chavez relies on the authority of *People v. Williams*, *supra*, 16 Cal.4th 635 and *People v. Marshall* (1997) 15 Cal.4th 1 in which similar issues were raised. In both cases, the trial court omitted an instruction that required the jury to find intent to kill as part of the finding on the special circumstances. In both cases, the Attorney General conceded the error. In both cases, our Supreme Court found the error to be of constitutional dimension and reversed, determining that the error was not harmless beyond a reasonable doubt under the *Chapman* standard. (*People v. Williams*, *supra*, at p. 689; *People v. Marshall*, *supra*, at p. 42.)

In *Williams*, a jury convicted the defendant of four counts of first degree murder. But the jury failed to reach a verdict on the special circumstance allegation of multiple murder, pursuant to section 190.2, subdivision (a)(3). The special circumstance allegation was then retried before a second jury, which found it to be true and returned a verdict of death. (*People v. Williams*, *supra*, 16 Cal.4th at p. 647.) The defendant was tried as an aider and abettor. The trial court at a special circumstance retrial instructed the jury that if it found the defendant had been convicted in this case of more than one offense of murder in the first or second degree, it could find the multiple-murder special-circumstance allegation to be true. The court omitted from the jury instruction the requirement of a finding by the jury that the defendant acted with an intent to kill. (*Id*. at pp. 688-689.)

The court in *Williams* found the error prejudicial. The court in *Williams* explained that the defendant was not the perpetrator of the murders, but an aider and abettor. Thus,

"the manner in which the actual perpetrator committed the murders (execution style) did not itself reveal an intent to kill by defendant as an aider and abettor." In addition, the jury was never presented with any of the evidence regarding the defendant's role in the murders, and therefore, the court could not conclude the jury had no reasonable doubt that the defendant had the intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 690.)

The People argued that the question of intent to kill had been necessarily determined adversely to the defendant when the guilt phase jury found him guilty as an aider and abettor of four counts of first degree murder. (*People v. Williams*, *supra*, 16 Cal.4th at p. 691.) The court in *Williams* disagreed, pointing out that the trial court also instructed on an alternate theory of aider and abettor liability, namely, the natural and probable consequences doctrine. (CALJIC No. 3.00 (1984 rev.).) A defendant guilty as an aider and abettor under the "natural and probable consequences" doctrine need not share the perpetrator's intent to kill. (*People v. Williams*, *supra*, at p. 691.) Also noted by the *Williams* court was the confusion of the guilt phase jury which asked the court several questions about the intent to kill requirement necessary to the multiple-murder special-circumstance allegation. (*Ibid.*) The court concluded that the trial court's omission of the intent to kill instruction at the retrial was prejudicial error. (*Ibid.*)

In *People v. Marshall*, *supra*, the defendant was convicted of one count of first degree murder, robbery, forcible rape, and kidnapping. The jury found true a special circumstance allegation that the murder was committed during the commission or attempted commission of the robbery and rape. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 11.) The jury was not instructed that it could not find the special circumstance allegations of robbery murder and attempted rape murder true unless it found the defendant had an intent to kill the victim. The court in *Marshall* agreed that the error required reversal of the special circumstances. (*Id.* at p. 41.)[6]

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[6]The murder occurred during the "window" period between our Supreme Court's rulings in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147. In *Carlos*, the court had held that intent to kill was an element of felony-murder

The court in *Marshall* found that although the evidence of intent to kill was sufficient to support the jury's finding of intent to kill, it was not overwhelming, and the jury could have had a reasonable doubt on the matter. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 42.) The victim died from asphyxia caused by a combination of a ligature gag and compression of the neck. The medical expert testified that it was possible that the victim died from the ligature gag alone and that the small bones in the neck which are often broken during strangulation were not fractured. "From this evidence the jury could reasonably have found that defendant gagged [the victim] to quiet her screams for help, without an intent to kill her, and that [the victim] choked to death on her gag." (*Id.* at p. 43.)

There are a number of cases in which the evidence has been found to be "overwhelming" that the defendant personally intended to kill the victim, even though an intent to kill instruction was erroneously not given as to the special circumstance alleged. In *People v. Osband*, *supra*, 13 Cal.4th 622, the defendant was charged with murder and the prosecutor argued under either a theory of felony murder or a premeditated and deliberate murder. (*Id.* at pp. 683-684.) The court in *Osband* found the deep, twisted stab wound in the neck of an elderly, tiny and weak woman, who was completely defenseless, was inconsistent with an unintentional homicide. (*Id.* at p. 682.)

In *People v. Cudjo* (1993) 6 Cal.4th 585, 598 the defendant was found guilty of first degree felony murder. The trial court failed to instruct that an intent to kill was an essential element of the robbery-murder or burglary-murder special circumstance. (*Id.* at p. 630.)[7] Despite this failure, the court in *Cudjo* found that the only reasonable

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special circumstance whether or not the defendant was the actual killer. (*Id.* at pp. 153-154.) *People v. Anderson* overruled *Carlos* and held that the intent-to-kill requirement applied only to an accomplice, not to the actual killer. However, *Carlos* was applicable at the time of the murder in *Marshall*, and as such, the jury could find the robbery-murder and the rape-murder special circumstance allegations to be true only if it found that the defendant acted with intent to kill.

[7]See footnote 6, *ante*.

conclusion that could be drawn from the evidence and the jury's findings was that the defendant intentionally murdered the victim. The victim had been bound and gagged and died from multiple blows to the head, which fractured the skull and lacerated the brain. "The systematic and prolonged assault with manifestly deadly force on the helpless victim is consistent only with an intent to kill." (*Ibid.*)

Also helpful to our analysis is *People v. Hardy* in which Hardy and Reilly were each convicted of two counts of first degree murder. A number of special circumstances allegations were found to be true. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 117.) An instruction for the special circumstance of multiple murder convictions was given which incorrectly omitted the intent to kill element. (*Id.* at p. 192.) There was some evidence that Reilly accompanied Hardy to the home where the murders were committed, but then stayed outside while Hardy committed the murders. Reilly therefore claimed the instruction was flawed because it failed to require a finding that he intended to kill if he only aided in the murder. The court agreed, but found the error to be harmless. (*Ibid.*)

The jury in *Hardy* had been instructed that if Reilly or Hardy were not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided and abetted the actual killer in the commission of the murder in the first degree. The jury also sustained the financial-gain special circumstance (§ 190.2, subd. (a)(1)), a finding which expressly required the jury to find the killing was "intentional." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 192.) The court in *Hardy* concluded:

> "Considered in combination, these instructions required the jury to find either that Reilly himself was the actual killer, or that he intentionally aided the actual killer in an intentional killing. The latter finding renders any error in this case harmless beyond a reasonable doubt." (*Id.* at p. 192.)

Here, the evidence is substantial that Chavez personally intended to kill the victim. In addition, as noted in the argument above, the other instructions given, read together, compel a conclusion that the jury understood that Chavez personally had to have an intent to kill to find the special circumstance true as to him.

The prosecutor, in closing argument, also articulated the need to find an intent to kill on the part of Chavez to find the special circumstance to be true. The prosecutor stated:

> "If you find that a defendant was not the actual killer of the victim, or you were unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted or assisted any actor in the commission of the murder in the first degree.
>
> "Again, if you find that Marcos Chavez went out there with these other two individuals with the intent to kill and was an aider and abettor, you can find him guilty as well of the special circumstance. And you have to decide each defendant's culpability separately.…"

Although the jury was also instructed, pursuant to CALJIC No. 3.02 (1997 rev.), explaining the natural and probable consequences doctrine, that was done within the context of second degree murder.

In light of the facts of the case and the other instructions given, we can conclude beyond a reasonable doubt that the trial court's error in omitting from the instruction the requisite element of intent to kill did not contribute to the jury's verdict of the special circumstance allegation as it pertains to Chavez. Consequently, the trial court's omission of the intent to kill instruction on the special circumstance was not prejudicial error as to Chavez.

4. PRADO, GUZMAN AND CHAVEZ CONTEND SECTION 190.2, SUBDIVISION (a)(21), ESTABLISHING A "DRIVE-BY" SPECIAL CIRCUMSTANCE, IS UNCONSTITUTIONALLY OVER INCLUSIVE[*]

Appellants argue that the special circumstance established by section 190.2, subdivision (a)(21) is unconstitutional both on its face and as applied here, primarily that it is overbroad and also that it violates the Eighth Amendment of the United States Constitution. We note that despite appellants' arguments to the contrary, since the death

[*]See footnote, *ante*, page 1.

penalty was neither sought nor imposed here, we need not address arguments that section 190.2, subdivision (a)(21) establishes an impermissible basis for death eligibility. (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 165.) Because of this, we will limit our discussion to whether section 190.2, subdivision (a)(21) is unconstitutional on its face or as applied to Prado, Guzman or Chavez and whether the life without possibility of parole sentences imposed here violate the Eighth Amendment.

The pertinent statutory scheme which underlies the resulting life without possibility of parole sentences is as follows. As has been noted previously, section 189 creates three categories of first degree murder, and provides in relevant part:

> "All murder which is perpetrated … by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree."

Section 190 specifies three possible penalties for first degree murder by providing, in relevant part, "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." The penalty to be applied is to be determined as provided in sections 190.1, 190.2, 190.3, 190.4, and 190.5. (*Ibid*.)

Section 190.2, in turn, reduces from three to two the sentencing options by providing, in relevant part:

> "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] …
>
> "(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death."

The question of the constitutionality of section 190.2, subdivision (a)(21) was resolved in *People v. Rodriguez*, *supra*, 66 Cal.App.4th 157, and we need not repeat the discussion here. After a thorough analysis of the issue, the court in *Rodriguez* found that

the special circumstance was not unconstitutional on its face. (*Id.* at pp. 161-162, 166-167, 172.)

Appellants challenge section 190.2, subdivision (a)(21) "as applied" because the murder was elevated to a first degree murder under section 189 by operation of the same facts which establish the special circumstance, rather than a finding of premeditation. This suggestion has already been decided to have no merit in *Lowenfield v. Phelps* (1988) 484 U.S. 231, rehearing denied 485 U.S. 944 [special circumstance of multiple murder may duplicate elements defining defendant's crime as first degree murder].) (See also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, fn. 12 [rejecting suggestion of similar argument regarding "lying-in-wait" special circumstance].)

Prado points out that a defendant could be convicted and found guilty under the special circumstance even if his presence in the car was "mere happenstance." Guzman contends nothing about the shooting suggests any greater culpability than that a heated exchange took place or imperfect self-defense. Chavez claims he was a mere aider and abettor. In effect, Prado, Guzman and Chavez are arguing that a sentence of life without possibility of parole for what could theoretically have been an unpremeditated murder is excessive under the Eighth Amendment.

Not so. It should be noted that the jury found appellants had, at least, a specific intent to inflict death. Further, the cases do not support appellants' contention. *Harmelin v. Michigan* (1991) 501 U.S. 957, for example, upheld a sentence of life without possibility of parole for possession of 672 grams of cocaine, a serious crime, but less heinous than shooting a victim with the intent to kill. In view of the *Harmelin* decision, it has been said that "the length of a sentence of imprisonment is largely a matter of legislative prerogative, and cannot violate the Eighth Amendment in any but the rarest cases." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.)

And as explained in *People v. Rodriguez*, *supra*:

> "… [C]ase law suggests that even a sentence of death for intentionally shooting a victim with intent to kill would not violate the Eighth Amendment of the United States Constitution. Jurisdiction to determine

> the validity of a death sentence lies in the California Supreme Court, rather than in the Court of Appeal, and we therefore do not purport to decide that issue here. However, the cases bearing on the circumstances in which death is a permissible sentence inferentially also bear upon the LWOP [life without parole] sentence imposed here, for if death is a permissible sentence, it follows that an LWOP sentence cannot violate the Eighth Amendment." (66 Cal.App.4th at p. 173.)

Hence the application of section 190.2, subdivision (a)(21) in this case is not unconstitutional under the Eighth Amendment.

5. PRADO, GUZMAN AND CHAVEZ CONTEND THAT BECAUSE THE DEGREE OF MORAL CULPABILITY ASSOCIATED WITH PREMEDITATED AND DELIBERATE MURDER IS DIFFERENT FROM THE DEGREE OF MORAL CULPABILITY ASSOCIATED WITH A KILLING PERPETRATED BY SHOOTING FROM A MOTOR VEHICLE, DUE PROCESS REQUIRES THE JURY AGREE UNANIMOUSLY ON ONE THEORY*

Two theories of first degree murder were argued and submitted to the jury: premeditated and deliberate murder, and murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle with the intent to inflict death. Appellants contend that in light of the instructions and on this record, it cannot be determined which theory the jury utilized to reach the verdict of guilt. The trial court refused Guzman's counsel's request to ask the jury for a determination of the theory relied on in reaching a verdict of first degree murder. As argued by appellants, because the degree of moral culpability associated with premeditated and deliberate murder is different from the degree of moral culpability associated with a killing perpetrated by shooting from a motor vehicle, federal due process requires that the jury agree unanimously on one theory where more than one theory is submitted to the jury.

Appellants rely on *Schad v. Arizona* (1991) 501 U.S. 624 for the argument that the jury should have been required to unanimously agree on a theory of first degree murder. *Schad*, however, flatly rejects appellants' claim.

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*See footnote, *ante*, page 1.

In *Schad*, the United States Supreme Court was confronted with whether due process required jury unanimity on the state's theory of first degree murder. At trial, the prosecution advanced both premeditated and felony-murder theories, and the jury's general verdict failed to indicate upon which theory it relied. The defendant argued premeditation and felony murder essentially constituted separate crimes as to which the jury must return individual verdicts, but the high court disagreed.

Writing for the plurality, Justice Souter explained due process principles limit "a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 632.) However, the plurality refused to adopt any single test for determining when that limit has been exceeded. Instead, the plurality decided, "[O]ur sense of appropriate specificity [in defining offenses] is a distillate of the concept of due process with its demands for fundamental fairness, [citation], and for the rationality that is an essential component of that fairness." (*Id.* at p. 637.)

Schad offered several factors to be considered in applying this conceptual approach. First, because defining criminal conduct is a legislative prerogative, courts should refrain from second-guessing what facts are necessary to constitute an offense and must necessarily be proven individually. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 638.) Second, courts must assess whether the state's particular way of defining a crime has a long history or widespread use. (*Id.* at p. 640.) If the state's definition has "historical and contemporary acceptance," it more probably comports with fundamental principles of justice. (*Id.* at p. 642.) And finally, courts should determine whether the challenged mental states are morally equivalent in terms of blameworthiness or culpability. (*Id.* at p. 643.)

Appellants argue that the result in *Schad* was only possible because historically, the law has generally viewed as equally blameworthy those who kill with premeditation and deliberation and those who kill in the course of the commission of a felony.

Appellants argue that in the present case, the two mental states at issue, premeditation and shooting from a vehicle with intent to kill, and are not equally blameworthy.

Appellants first claim a lack of general acceptance in history of the notion of characterizing as first degree murder a murder committed by shooting from a vehicle with the intent to kill. As correctly noted by appellants, this particular means of establishing mens rea was not added to the Penal Code until 1994. However, appellants fail to note the footnote in *Schad* which states:

> "We note, however, the perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases, like this one, that deal with crimes that existed at common law." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 640, fn. 7.)

Appellants also argue that the Legislature's inclusion in the list of crimes which constitute first degree murder of all killings committed intentionally by shooting from a motor vehicle does not lead automatically to the conclusion that this crime evidences a highly culpable mental state equal to premeditation and deliberation. However, appellants' argument that there is a difference in moral culpability between these two different theories is rebutted by the fact that the Legislature has codified as equivalent these two theories of first degree murder.

Although premeditated murder is characterized by a planned, deliberate intent to kill (see *People v. Anderson* (1968) 70 Cal.2d 15, 24-25), and felony murder merely requires the intent to commit the underlying felony (*People v. Hernandez* (1988) 47 Cal.3d 315, 346), *Schad* found the two mental states were sufficiently alike to be treated as alternative means of satisfying the mens rea requirement for first degree murder.

Using the mental states involved in *Schad* as guideposts, it is clear that premeditated murder and shooting intentionally out of a vehicle with the intent to inflict death are also morally on a par. On the one hand, a person who kills intentionally, i.e., with express or implied malice, is less culpable than someone who kills with premeditation and deliberation. On the other hand, the mental state associated with either

express or implied malice is more blameworthy than the mindset needed for felony murder, insofar as felony murder does not require any intent to kill. Because the range of culpability between premeditated murder and intentional killing is narrower than the culpability levels deemed equivalent in *Schad*, it follows the two mental states at issue here are morally equivalent. (See also *People v. Brown* (1995) 35 Cal.App.4th 708, 715 [determining express and implied malice are on a moral par pursuant to *Schad*].)

The trial court did not err in failing to have the jury agree on one theory of murder.

6. CHAVEZ CONTENDS THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THAT HE MUST HAVE PERSONALLY PREMEDITATED AND DELIBERATED THE ATTEMPTED MURDER CHARGES*

Chavez was charged with and convicted of four counts of attempted murder with premeditation and deliberation. Chavez contends the trial court erred when it failed to instruct the jury that it could not convict him of premeditated attempted murder as an aider and abettor unless it found he personally premeditated and deliberated. This argument was made and rejected in *People v. Laster* (1997) 52 Cal.App.4th 1450 upon which the People rely.

In *Laster*, *supra*, the defendants were convicted of four counts of deliberate and premeditated attempted murder arising out of a drive-by shooting. The defendants claimed the shooting was the unplanned and unforeseen act of another passenger in the same vehicle. The prosecution argued that the defendants were still liable as aiders and abettors for the premeditation and deliberation of the perpetrator. (*People v. Laster*, *supra*, 52 Cal.App.4th at p. 1455.) On appeal, the defendants argued that jury instructions regarding aiding and abetting were insufficient because a section 664, subdivision (a)[8] penalty required a showing that the aider and abettor personally

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*See footnote, *ante*, page 1.

[8]At the time of the offenses, section 664, former subdivision (a) provided: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: [¶] (a) If the offense so attempted is punishable by imprisonment in the state prison, the person guilty of that attempt is punishable by imprisonment in the state prison for one-half

premeditated the murder. (*People v. Laster*, *supra*, at p. 1469.) The court, applying the plain meaning of the language to determine the legislative intent, disagreed, and after analysis stated: "We conclude that an aider and abettor can be subject to life imprisonment for willful, deliberate, and premeditated murder even if he or she did not personally deliberate or premeditate." (*Id.* at p. 1473.) We respectfully disagree with the court's reasoning in *Laster*.[9]

In *People v. Bright* (1996) 12 Cal.4th 652 our high court determined the legislative intent of the 1986 amendment to section 664. Reviewing the history of section 664, *Bright* held:

> "We conclude that the provision in section 664, subdivision (a), imposing a greater punishment for an attempt to commit a murder that is 'willful, deliberate, and premeditated' does not create a greater degree of attempted murder but, rather, constitutes a penalty provision that prescribes an increase in punishment (a greater base term) for the offense of attempted murder." (*People v. Bright*, *supra*, at pp. 656-657.)

According to *Bright*, nothing in the wording of section 664, subdivision (a) reflected a legislative attempt to create a greater degree of the offense of attempted murder. Rather, the language— "'[t]he *additional term* provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed *unless the fact* that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and *admitted or found to be true by the trier of fact*' (§ 664, subd. (a)), italics added) —is the language typically employed in describing sentence

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the term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole;… The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (Stats. 1994, ch. 793, § 1.)

[9]This court, in *People v. Lee* (2000) 85 Cal.App.4th 706, previously disagreed with the court's reasoning in *Laster*. Review was granted in *People v. Lee* on March 28, 2001 (S094597) on this very issue.

enhancements, as opposed to defining a crime or prescribing the term of imprisonment for the crime itself." (*People v. Bright*, *supra*, 12 Cal.4th at p. 667.) As such, there is only one possible violation of attempted murder since there are no degrees of attempted murder, and the penalty provision for willful, premeditated, and deliberate attempted murder did not create a "substantive offense." (*Id.* at p. 668.)

Laster's plain meaning construction of section 664 cannot be reconciled with the construction given that same language in *Bright*. We agree that *Laster* correctly held that the phrase "[e]very person who attempts to commit any crime" encompasses those who aid and abet an attempt under section 31, which defines principals in the commission of a crime. We also agree that section 664 provides different measures of punishment depending on the crime attempted. Our disagreement with *Laster* comes from its holding that "[i]f 'the crime attempted' is willful, deliberate, and premeditated murder, 'the person guilty of that attempt' is subject to life imprisonment."

As made plain by our Supreme Court in *Bright*, the language of section 664 does not permit a construction that an attempt to commit a willful, premeditated and deliberate murder constitutes a substantive crime or a greater degree of a crime. Section 664 permits a conviction of attempted murder, and in subdivision (a) provides a penalty provision (a greater base term) when that crime is admitted to or proven to have been willful, premeditated and deliberate. (*People v. Bright*, *supra*, 12 Cal.4th at pp. 656-657, 668.)

The court in *Laster* erroneously lumped together two separate issues: 1) whether an aider and abettor may be held liable for attempted murder under the traditional application of sections 664, 187 and 31 if he or she aided and abetted another in the commission of the attempted crime of murder; and 2) whether an aider and abettor may be punished with a life sentence under subdivision (a) of section 664.

Treating the additional punishment as an enhanced penalty, we look to *People v. Walker* (1976) 18 Cal.3d 232 to determine whether the Legislature intended to impose derivative liability where the actor who aided and abetted attempted a willful, deliberate,

and premeditated murder. In *Walker*, the Supreme Court held that a defendant is not subject to a firearm use enhancement under for section 12022.5 unless her or she personally used a firearm.

> "Generally, if a statute is intended to impose a derivative liability on some person other than the actor, there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act. Such a direction is found in section 31 which fixes responsibility on an aider and abettor for a crime personally committed by a confederate. But the statute which defines aiders and abettors as principals in the commission of a criminal offense does not also purport to impose additional derivative punishment grounded on an accomplice's personal conduct, as those statutes which provide for such increased punishment '"do not define a crime or offense but relate to the penalty to be imposed under certain circumstances."' [Citations.] Hence the rules which make an accused derivatively liable for a crime which he does not personally commit, do not at the same time impose a derivatively increased punishment by reason of the manner in which a confederate commits the crime. [¶] … [¶] Our conclusion, of course, is also compelled by the established policy 'to construe a penal statute as favorably to the defendant as its language and the circumstances of its application reasonably permit; … the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute.' [Citation.]" (*People v. Walker*, *supra*, 18 Cal.3d at pp. 241-242.)

In *People v. Cole* (1982) 31 Cal.3d 568, 576, the Supreme Court rejected the proposition that additional punishment liability "may be based on prohibited conduct performed by one other than the charged defendant." The court held that section 12022.7 could not apply to persons who merely aided and abetted, even where a person "directs another to inflict the physical injury …." (*People v. Cole*, *supra*, at p. 571.)

In *People v. Piper* (1986) 42 Cal.3d 471, 473, the Supreme Court held the enhancement under sections 667 and 1192.7, subdivision (c)(8) for a prior conviction of a felony in which the defendant used a firearm applied only if the prior felony required personal firearm use. "Thus, after *Piper*, an enhancement which neither expressly authorizes vicarious liability nor expressly includes a 'personally' limitation is read to apply only to defendants who personally engage in the proscribed conduct." (*People v. Gutierrez* (1996) 46 Cal.App.4th 804, 814.) Such is the case here.

In reviewing the pertinent language, we conclude there is no express authorization for vicarious liability application of the greater punishment of a life sentence under section 664, subdivision (a). The language is at best ambiguous regarding any legislative intent to apply the greater base term to aiders and abettors, and under the weight of authority, suggests otherwise.

The jury in this case was instructed pursuant to CALJIC No. 8.67, defining willful, deliberate and premeditated attempted murder. The court instructed, in part,

> "It is also alleged in those Counts 1 through 5 [*sic*] of attempted murder that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. Willful means intentional. Deliberate means forms or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.
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> "Premeditated means considered beforehand. If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate and premeditated murder. [¶] …
>
> "To constitute willful, deliberate and premeditated attempted murder, *the would-be slayer* must weigh and consider the questions of killing and the reasons for and against such a course, and having in mind the consequences decides to kill and makes a direct but ineffectual act to kill another human being." (Italics added.)

Since the instruction as given removed the necessary mental state element of the alleged offense from the jury's consideration, we again use the *Chapman* "beyond a reasonable doubt" standard for assessing prejudice. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130; *People v. Lee*, *supra*, 43 Cal.3d at pp. 673-674.) We look to see "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt*, *supra*, 500 U.S. at pp. 402-403.) To say that an error

did not contribute to the verdict is to find the error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. (*Id.* at p. 403.) Employing this standard, we cannot say the error was harmless.

First, we cannot say that by finding Chavez guilty of first degree murder in count 1 he was also necessarily guilty of willful, deliberate and premeditated attempted murder in counts 2 through 5. Respondent recognized this possibility, although reluctantly, at oral argument.[10] First degree murder was presented to the jury on two theories: premeditated and deliberated murder with express malice, and "drive-by" murder, or "murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death." As was discussed, *ante*, the trial court refused a request that the jury be asked for a determination of the theory relied on in reaching a verdict of first degree murder. By finding Chavez guilty of first degree murder, at the very least, he had an intent to kill. But it does not automatically follow that he necessarily had the mental state necessary to find him guilty of premeditated and deliberated murder.

Here, the charge of attempt was one of attempted murder with premeditation and deliberation. The prosecutor argued only that Chavez was an aider and abettor, however,

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[10]At oral argument, the following question was asked of respondent:

"Presiding Justice Ardaiz: Assuming for the moment, counsel, that [the verdict is] not predicated upon a natural and probable consequences but rather requires an evaluation of … an intent of the aider and abettor, vis-à-vis the intent of the perpetrator. [¶] … [¶] Assuming that for the moment, in Chavez's case, with respect to the attempted premeditated murder, are the findings in this case utilizing the issue of the independent state of mind of Mr. Chavez sufficient to support a conclusion that the jury found that Mr. Chavez acted with the same intent as the shooter?

"Deputy Attorney General Whalen: I haven't fully thought out that scenario but … I think my answer has to be 'no' because of the possibility that, or because of the fact that we don't know which theory the jury used. Um, you know, if we could say for sure that they went and found premedit – you know, if they didn't use natural and probable at all, and just found that, you know, Chavez knew all along that they were going to shoot and kill people, then it would be easy. But we don't. And because we don't know that, I don't think we can say that the jury made the requisite findings."

no instruction was given that Chavez, as an aider and abettor, must personally have weighed and considered the question of killing, and still decided to aid and abet the would-be slayer in the "direct but ineffectual act to kill another human being."

While it was clear from the evidence that Chavez was the driver and not an actual shooter, it is equally clear that the jury found that he personally harbored the specific intent to kill in finding him guilty of first degree murder and finding true the special circumstance. It does not follow, however, that the jury found that he personally deliberated and premeditated since such a finding would not be required to find him guilty of first degree murder by means of shooting out of a motor vehicle at another person outside the vehicle with the intent to inflict death. Thus, it cannot be said, on the facts of this case and the instructions given, that the instructional error was harmless beyond a reasonable doubt. The finding of deliberation and premeditation on the four counts of attempted murder as to Chavez must be reversed, and he must be resentenced to the lesser term on those counts.

7. GUZMAN AND PRADO CONTEND SECTION 654 PRECLUDES ENHANCING THEIR MURDER SENTENCE PURSUANT TO SECTION 12022.5*

As is relevant to this argument, Guzman and Prado were both sentenced to four consecutive terms of life with the possibility of parole on the four attempted murder counts. Each count was enhanced by 10 years pursuant to section 12022.5, subdivision (b)(1). Each was also sentenced to life without the possibility of parole on the murder charged in count 1. That count was also enhanced by 10 years pursuant to section 12022.5, subdivision (b)(1). Guzman and Prado contend section 654 precludes enhancing the murder sentence pursuant to section 12022.5, subdivision (b)(1).

As argued by Guzman and Prado, the allegation that elevated the killing to first degree murder was the element that it was perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle with intent to

*See footnote, *ante*, page 1.

inflict death pursuant to section 189. The special circumstance which required that the sentence be one of life without the possibility of parole was the drive-by shooting special circumstance under section 190.2, subdivision (a)(21). The identical firearm use allegation then added a 10-year determinate term enhancement to Guzman and Prado's sentences. As argued by Guzman, "The same act which is the basis for the enhancement has already been used twice, once as an element of the offense and then as the basis for the special circumstance to invoke … an even greater penalty." In other words, Guzman and Prado are arguing that they are being punished twice for the same act, in violation of section 654.

Contrary to Guzman and Prado's position, they were properly sentenced. Although section 12022.5, subdivision (a) specifically prohibits dual use, i.e., it does not apply when the firearm use is an element of the offense. Section 12022.5, subdivision (b)(1), at issue here, does not include any such restriction, and states in relevant part:

> "[A]ny person who is convicted of a felony or an attempt to commit a felony, including murder or attempted murder, in which that person discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to the person of another, shall, upon conviction of that felony or attempted felony, in addition and consecutive to the sentence prescribed for the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years."

In addition, section 12022.5, subdivision (d) states that the "additional term provided by this section may be imposed in cases of … murder if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death."

The conclusion which must be drawn from this express exclusion is that the Legislature intended the 10-year enhancement for discharging a firearm at an occupied vehicle which caused death to apply to a defendant convicted of a drive-by murder. The Legislature has created an exception to the dual use prohibition, which is within its power to do so. (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 572.) Consequently, the trial court did not err in imposing the section 12022.5, subdivision (b)(1) enhancement.

8. CHAVEZ CONTENDS SECTION 654 PRECLUDES ENHANCING HIS MURDER SENTENCE PURSUANT TO SECTION 12022*

The trial court imposed a term of life without possibility of parole on Chavez, based on the jury's findings that the murder was perpetrated by discharging a firearm from a vehicle, pursuant to section 190.2, subdivision (a)(21). Thus, the use of a firearm caused his sentence to be increased from the sentence of 25 years to life statutorily mandated for first degree. The court also imposed an additional four months for the vicarious use of a firearm, pursuant to section 12022, subdivision (a)(1). As argued by Chavez, this enhancement impermissibly punished him twice for the same conduct, in violation of section 654. We agree.

Section 12022, subdivision (a)(1) provides:

> "Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless the arming is an element of the offense of which he or she was convicted. This additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

Unlike the enhancement provided in section 12022.5, subdivision (a)(1), with the section 12022.5, subdivision (d) exception addressed above, no such exception is found in section 12022. The additional punishment imposed must therefore be stayed.

9. CHAVEZ CONTENDS SECTION 654 PRECLUDES CONSECUTIVE SENTENCING FOR A VIOLATION OF SECTION 12034, SUBDIVISION (b)*

Chavez was convicted in count 7 of violating section 12034, subdivision (b) which states:

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*See footnote, *ante*, page 1.

*See footnote, *ante*, page 1.

> "Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years."

Chavez argues that the conduct supporting the conviction for this section was the same that supported the conviction for murder in count 1 perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. Section 654 prohibits imposition of multiple punishment for the same act.

Respondent agrees, as do we. Although multiple conviction is appropriate, multiple punishment is barred under section 654. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988.) The eight-month term imposed pursuant to count 7 must be stayed.

10. PRADO AND CHAVEZ CONTEND THE TRIAL COURT IMPOSED AN UNAUTHORIZED SENTENCE BY IMPOSING A FINE PURSUANT TO SECTION 1202.45*

At sentencing, the trial court imposed a fine on Chavez of $10,000 pursuant to section 1202.45, which was stayed pending successful completion of parole. No such fine was imposed as to Prado or Guzman.

Chavez, who was joined in the argument by Prado, correctly argues that section 1202.45 does not apply to a defendant whose sentence includes life in prison without possibility of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178. Section 1202.45 states:

> "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

*See footnote, *ante*, page 1.

We first note that the issue as to Prado is moot. No such fine was imposed in his case. As to Chavez, the issue is viable.

As noted by the court in *Oganesyan*, *supra*, section 1202.45 does not apply to a defendant whose sentence includes life in prison without possibility of parole. It does not matter that the defendant also received a sentence that allows for parole; the section applies to the case as a whole, not the sentences on the individual counts. (*People v. Oganesyan*, *supra*, 70 Cal.App.4th at p. 1185.) As such, the fine should not have been imposed on Chavez as he was sentenced to life without the possibility of parole.

DISPOSITION

The judgment is affirmed in its entirety as to Prado and Guzman. As to Chavez, the finding of premeditation and deliberation on counts 2, 3, 4 and 5 is reversed and the matter is remanded for resentencing. Chavez's four-month section 12022, subdivision (a)(1) enhancement and eight-month sentence imposed in count 7 are ordered stayed pursuant to section 654. The $10,000 section 1202.45 fine imposed on Chavez was unauthorized and is ordered stricken. In all other respects, the judgment as to Chavez is affirmed.

_____
Wallace, J.†

WE CONCUR:

_____
Ardaiz, P.J.

_____
Wiseman, J.

†Judge of the Kern Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.